Supreme Court, U. S.
FILED
APR 12 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1428

A.H. ROBINS COMPANY, INC., *et al.*,

Petitioners,

—against—

KALMAN ROSS and ANITA ROSS,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ERIC L. KEISMAN
Attorney for Respondents
845 Third Avenue
New York, New York 10022
(212) 759-4600

Of Counsel:

MARIAN R. PROBST
WOLF POPPER ROSS WOLF & JONES

TABLE OF CONTENTS

PAGE

Questions Presented 3

Statement of the Case 4

Proceedings Below 7

Reasons for Denying the Writ 9

1. There Is No Decision Below That Is Ripe for Review 9
2. The Decision of the Court of Appeals Creates No Conflict With Any Decision of This Court, and It Decided No Significant Unsettled Question of Federal Law 11
3. There Is No Conflict With the Decisions of Other Circuits in the Decision Below; Nor Does It Raise Any Unsettled Question as to the Law of Causation or Reliance 17

Conclusion 21

Table of Authorities

Cases:

Aetna Life Insurance Co. of Hartford, Conn. v. *Haworth*, 300 U.S. 227 (1937) 10

Affiliated Ute Citizens of Utah v. *United States*, 406 U.S. 128 (1972) 12, 20

American Construction Co. v. *Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372 (1893) 9

Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975) 11, 12, 16, 18

Brotherhood of Locomotive Firemen and Enginemen v. *Bangor & Aroostook R.R. Co.*, 389 U.S. 327 (1967) 9

PAGE

Cannon v. *University of Chicago*, 441 U.S. 677 (1979) 14
Conley v. *Gibson*, 225 U.S. 41 (1957) 11
Cort v. *Ash*, 422 U.S. 66 (1975) 14

Doelle v. *Ireco Chemicals*, 391 F.2d 6 (10th Cir. 1968) 12
Drake v. *Thor Power Tool Co.*, 282 F.Supp. 94 (N.D. Ill. 1967) 12
Dupuy v. *Dupuy*, 551 F.2d 1005 (5th Cir. 1977), *cert. denied*, 434 U.S. 911 (1977) 19

Ellis v. *Carter*, 291 F.2d 270 (9th Cir. 1961) 12
Ellis v. *Dixon*, 349 U.S. 458 (1955) 9
Ernst & Ernst v. *Hochfelder*, 425 U.S. 185 (1976) 12

Fischman v. *Raytheon Mfg. Co.*, 188 F.2d 783 (2d Cir., 1951) 12, 14, 15, 19

Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 9
Holdsworth v. *Strong*, 545 F.2d 687 (10th Cir. 1976), *cert. denied*, 430 U.S. 955 (1977) 19

International Longshoremen's & Warehousemen's Union, Local 37 v. *Boyd*, 347 U.S. 222 (1954) 10

Jackson v. *Oppenheim*, 533 F.2d 826 (2d Cir. 1976) 20
Jordan Bldg. Corp. v. *Doyle, O'Conner & Co., Inc.*, 401 F.2d 47 (7th Cir. 1968) 12

Keller v. *Adams-Campbell Co.*, 264 U.S. 314 (1924).... 12

Landy v. *FDIC*, 486 F.2d 139 (3d Cir. 1973), *cert. denied*, 416 U.S. 960 (1974) 19
Layne and Bowler Corp. v. *Western Well Works*, 261 U.S. 387 (1923) 12

McCarthy v. *E.E. Brunner*, 323 U.S. 673 (1944) 3

PAGE

Rescue Army, et al. v. *Municipal Court of City of Los Angeles*, 331 U.S. 549 (1947) 10

Santa Fe Industries, Inc. v. *Green*, 430 U.S. 462 (1977) 11
Schlick v. *Penn-Dixie Cement Co.*, 507 F.2d 374 (2d Cir. 1974) 18, 20
Superintendent of Insurance v. *Bankers Life & Cas. Co.*, 404 U.S. 6 (1971) 12

Touche Ross & Co. v. *Redington*, 99 S.Ct. 2479 (1979) 11, 13
Transamerica Mortgage Advisors, Inc. (TAMA) v. *Lewis*, 100 S.Ct. 242 (1979) 11, 13, 14

United States v. *Freuhauf*, 365 U.S. 146 (1961) 10

Vervaecke v. *Chiles, Heider & Co., Inc.*, 578 F.2d 713 (8th Cir. 1978) 20

Wisconsin Electric Co. v. *Duxmore Co.*, 282 U.S. 813 (1929) 12

Statutes and Rules:

Securities Act of 1933:
§ 11 (15 U.S.C. § 77k) 14

Securities Exchange Act of 1934:
§ 10b (15 U.S.C. § 78 j(b)) .....*passim*
§ 17(a) (15 U.S.C. § 78 (q)).....13, 14, 15
§ 18 (15 U.S.C. § 78 r) .....*passim*

Investment Advisers Act of 1940:
§ 206, 15 U.S.C. § 80b-6 14
§ 215, 15 U.S.C. § 80b-15 14

Title IX of the Education Amendments of 1972:
§ 901, 20 U.S.C. § 1681 14

PAGE

Federal Rule of Civil Procedure 9(b) 2, 7

Legislative Materials:

78 Cong. Rec. 8038-8040 (1934) 15

Other Authorities:

Stern & Gressman, *Supreme Court Practice* (5th Ed. 1978) 12

Tribe, *American Constitutional Law* (1978) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1428

A.H. ROBINS COMPANY, INC., *et al.*,

Petitioners,

—against—

KALMAN ROSS and ANITA ROSS,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

This brief is submitted on behalf of respondents in opposition to the petition, filed by petitioners who were defendants-appellees below, for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Second Circuit entered on September 24, 1979.

That decision unanimously reversed the decision of the United States District Court for the Southern District of New York, which had held, among other things, that § 18 of the Securities Exchange Act of 1934 (the "Exchange Act") provided the exclusive remedy for that portion of respondents' claims relating to omissions and misrepresentations in documents of petitioner A.H. Robins Company, Inc. ("Robins") filed with the Securities and Exchange Commission ("SEC"), and thus they could not

form any components of a claim under § 10(b) of the Act.*

The Court of Appeals held that, at least in the context of an action where investors seek redress for damages arising out of an ongoing fraudulent course of conduct, elements of misconduct which might, in part, form the basis for a claim under § 18, could also constitute elements of a claim under § 10(b).

The District Court had also held that respondents' Amended Complaint (the "complaint") should be dismissed with prejudice for failure to plead fraud with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure ("FRCP"). The Court of Appeals held that respondents should be granted leave to replead, although it found the complaint insufficiently specific.

No other issues were decided by the Court of Appeals. Petitioners, in a vain effort to create the appearance of a conflict among circuits, argue that the Court of Appeals "dispensed with" reliance as an element of a § 10(b) claim, although no such issue was litigated below. The Court of Appeals "dispensed with" nothing. In illustrating the important differences between the elements of a § 10(b) claim and a § 18 claim, it simply noted, among other major differences, that certain presumptions of reliance are available in the litigation of a claim under § 10(b), while affirmative proof of direct reliance on a specific document must be alleged and proved to sustain a claim under § 18.

---

* The Court of Appeals agreed with the District Court that respondents had set forth cognizable claims arising under § 10(b) and Rule 10b-5 promulgated thereunder with respect to petitioners' failure to disclose material information to the public and the numerous asserted omissions from and misrepresentations in a series of publicly disseminated documents of Robins, including Annual Reports to shareholders, press releases, and a prospectus which were not filed with the SEC.

The decision of the Court of Appeals creates no conflict with the decisions of any other court of appeals. It is not in conflict with the decisions of this Court, which has neither found it necessary nor appropriate to rule on the issues proffered by petitioners, while it has carefully delineated the proper scope of the established private right of action under § 10(b).*

A petition for rehearing with a suggestion for rehearing *in banc* was unanimously denied by the Court of Appeals. Respondents' consent to petitioners' motion for a stay of the issuance of the Court's mandate, pending application and disposition of the Petition for Certiorari, in no way indicated agreement that a question important enough to warrant consideration by this Court was at issue.

Questions Presented

Threshold questions, either of which if answered in the negative, are dispositive of the present petition, are:

1. Should this Court grant certiorari to consider any of the issues proffered by petitioners where, as here, there is no concrete case before this Court wherein there could be a determination of the legal rights of the parties upon a set of facts alleged; the complaint having been dismissed for failure of particularity, leave to amend having been granted by the Court of Appeals, and respondents having not yet filed a new amended complaint? Would not the review petitioners seek give rise to adjudication of abstract and hypothetical questions?

---

* Neither the District Court nor the Court of Appeals considered or ruled upon the so-called "threshold" issue of whether a cause of action properly arises by implication under § 10(b) in favor of open-market purchasers of securities. In view of the virtually universal recognition of such claims by this Court and the courts of appeals (see p. 12, *infra*), there was no occasion to do so; and petitioners never raised the question below. It is therefore not properly raised here. *McCarthy* v. *E.E. Brunner,* 323 U.S. 673 (1944).

2. Should this Court grant certiorari to review the decision of the Court of Appeals which creates no conflict with any decision of this Court or other courts of appeals and which decided no significant unsettled questions of federal law?

The first question propounded by petitioners in wholly abstract form and not fairly presented by the record, would be better stated as follows:

3. (a) Is the right to maintain a private claim for relief for fraud under § 10(b) of the Exchange Act on behalf of purchasers of securities in the open market negated, where the market price of a company's securities is inflated by its broad public dissemination of favorable claims regarding its business and the prospects and success of a new product and where information belying those claims is concealed so that the total mix of information with respect to the company and its securities is fraudulently distorted, if some misleading information was also included in, or some matters concealed were also omitted from, documents filed with the SEC?

(b) In this context, is it not sufficient that such open market purchasers relied upon the total mix of information disseminated into the market in making their purchases and were thus defrauded in making purchases at an inflated market price, although they did not read, or thus directly rely on, filed documents in which material misinformation was also published, or from which material information was omitted?

Statement of the Case

The Dismissed Complaint

By virtue of its numerous omissions and mischaracterizations, the "Statement of the Case" in the Petition is materially misleading. For example, in an effort to cre-

ate the impression that respondents' claims fell squarely within the confines of § 18 in restating the complaint, it wholly distorts the thrust of the claim for relief sought to be pleaded.

The complaint alleged that respondents, Kalman and Anita Ross, purchased, in the open market, 100 shares of the common stock of petitioner Robins on July 23, 1973 and that, prior to and at the time of their purchase, the market in Robins' common stock was inflated by a fraudulent and deceptive course of conduct entered into by petitioners beginning in April 1972. (Appendix F-3, 6, 19)*

The complaint's actual thrust was accurately summarized by the Court of Appeals:

> "The gravamen of the complaint is that the defendants manipulated and artificially inflated the market price of Robins' common stock by disseminating false and misleading information about the effectiveness and safety of the Dalkon Shield, an intrauterine birth control device which it manufactured, and by failing to reveal information which indicated that the shield was more dangerous and less effective than the company's earlier public statements had indicated." (A-3).

That Court also correctly pointed out that, apart from the failure to disclose, respondents' claims arose out of a course of conduct including the dissemination of nine separate documents: Robins' 1970 Annual Report to shareholders; 1971 Annual Report to shareholders; March 1972 prospectus; 1972 Form 10-K; 1973 Form 10-K; press releases of April 19, 1973 and January 31, 1974; 1973 Annual Report to shareholders and press release of April 18, 1974.**

---

* Citations to the Appendix refer to the Appendix to the Petition for Certiorari, and are hereafter styled, e.g., "(A-1)", "(B-1)" etc., referring to the section and page only.

** Contrast the purported summary of the complaint by petitioners, which seeks to create the false impression that Robins' Form

Respondents charged that, in the first three listed documents, Robins and the other defendants emphatically asserted, and disseminated to the public, claims of the scientific and business significance of an intrauterine contraceptive device manufactured by Robins, known as the Dalkon Shield, with boasts of intensive worldwide marketing, acceptance by major population control groups, and success in the market. (F-7, 8). But, beginning as early as April 1972, clinical information negating the original claims began to surface—some of it from the same research source that had initially supported those claims—along with news of serious contraindications, such as septic abortions and deaths in which the shield was implicated.

The complaint charged that petitioners completely failed to disclose this deleterious information to the public until May 1974; that they aggravated the situation by making additional (if muted) favorable statements in certain of the later documents; and that the market for Robins' common stock remained inflated by misinformation until that time. Further, it was alleged that, on partial disclosure, the market price of Robins stock precipitously dropped, to the damage of respondents and others who purchased during the period of concealment (i.e., the "class"). Alleging that the omissions and misstatements were knowing or reckless, that petitioners had a duty to disclose the concealed information, and that respondents and others similarly situated had purchased Robins' stock in reliance on "the integrity of the market" and in the absence of disclosure, the complaint asserted a claim under § 10(b) and Rule 10b-5. (See A-4-9).

10-K for 1972 was central to respondents' claims. (Petition, p. 5). Further it misdescribes the text of the allegations cited (F-11-12), as does the remainder of the purported summary of respondents' allegations. (Compare, Petition, p. 4-6 with Appendix, F. 7-15).

The Proceedings Below

A. *The District Court*

Petitioners moved to dismiss the complaint on the grounds that (1) the complaint alleged only a claim for corporate mismanagement and thus the court lacked subject matter jurisdiction; (2) the complaint failed to allege fraud with the particularity required by FRCP 9(b); and (3) the claims asserted could not be maintained under § 10(b) since § 18 provided the exclusive remedy for misstatements or omissions in documents filed with the SEC. (B-2).

The District Court decided that it did have subject matter jurisdiction in that the thrust of the complaint was fraud affecting the market in Robins' stock. It said that, to the extent that respondents had alleged omissions from, and mispresentations in, Robins' annual reports, a prospectus and press releases—documents not "filed" with the SEC—they had "generally stated a claim cognizable under § 10(b) and Rule 10b-5. . . ." (B-18). The court then held, however, that the complaint "lacks sufficient allegations . . . to determine whether plaintiffs have a proper claim under Section 10(b)," and therefore failed to comply with FRCP 9(b).

The basis for this holding was that respondents had failed to particularize "the time when the defendants allegedly knew or recklessly disregarded the undisclosed information." (B-9) As this holding applied to all of the "knowledge" allegations, whether dealing with filed or unfiled documents, the Rule 9(b) holding alone was dispositive. Nonetheless, the court went on to hold that, "the amended complaint in part, alleges facts which would support claims under Section 18 of the Act," and that, "since Section 18 provides the exclusive remedy available to private plaintiffs for acts or omissions which may be within the purview of that section, these plaintiffs cannot assert

claims under Section 10(b) which are based upon such acts or omissions." (B-11). The District Court granted the motion and, by opinion and order dated January 8, 1979, dismissed the action with prejudice. (B-19).

B. *The Court of Appeals*

The Court of Appeals, dealing with the issue of whether a claim which fell within the traditional contours of a § 10(b) action could include elements of omission or misrepresentation proscribed by § 18(a), concluded that "even as to those documents filed with the SEC, plaintiffs may seek to prosecute their claim under § 10(b) and Rule 10b-5." (A-24).

The Court of Appeals held that the District Court erred in dismissing the complaint, to the extent that it did so without leave to amend. In so holding, it agreed that respondents had insufficiently pleaded the necessary "circumstances which would give rise to an inference of fraud", with regard to petitioners' knowledge of the concealed adverse information; while acknowledging that the misrepresentations and omissions as such had been particularized. (A-27-A-29). Stating that it was "hesitant to preclude the prosecution of a possibly meritorious claim because of defects in the pleadings", the court reversed and remanded to allow repleading. (A-3; A-29).

In purporting to describe the Court of Appeals decision, the Petition (at p. 8-9) groundlessly claims that it created a new cause of action, misdescribes the premises of the decision, wrongly accuses the Court of Appeals of "dispensing with" various requisites of § 10(b), and accuses that Court of wrongful disregard of pertinent decisions of this Court calling for correction. Rather than clutter this counter-statement with inappropriate argumentation, these matters will be dealt with under "Reasons for Denying the Writ," *infra.*

Reasons for Denying the Writ

Certiorari should be denied in this case. The issues propounded for review cannot be determined on a concrete factual record, since there is indeed no factual record before this Court. Petitioners thus seek to obtain abstract and hypothetical rulings on amorphous questions. If any potentially significant questions of federal securities law may lie inchoate within the bounds of a case which may in the future be pleaded, such questions cannot fairly be said to arise from a determination dismissing a complaint with leave to replead. The opinion of the court of appeals is in harmony with the decisions of this Court. There is no holding in the decision below conflicting with any decision of this Court or any decision of any other court of appeals.

1. *There Is No Decision Below That Is Ripe for Review.*

The subsisting decision in this action is that the complaint has been dismissed, with leave to replead; a classic non-final determination, and one which leaves no factual record on which to base further review. This Court does not usually issue a writ of certiorari to review such a non-final determination, *American Construction Co.* v. *Jacksonville, T & K. W. R. Co.*, 148 U.S. 372 (1893); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916); particularly where the Court of Appeals has remanded the cause for further proceedings. *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor & Aroostook R.R. Co.*, 389 U.S. 327 (1967).

This Court has been loath to grant certiorari to review important federal questions, upon a record inadequate to establish clearly the context and boundaries of the controversy to be determined. See *Ellis* v. *Dixon*, 349 U.S. 458 (1955), [writ dismissed as improvidently granted

where petitioners' complaint had been dismissed by the state court, and what "has been alleged is entirely too amorphous to permit adjudication of the constitutional issues asserted." (At 462)]; *Rescue Army, et al.* v. *Municipal Court of City of Los Angeles,* 331 U.S. 549, 568-570 (1947).

This reluctance to rule upon an inadequate record arises from the desire that determinations of such issues should take place in the context of a concrete factual setting, so as to avoid abstract, hypothetical or advisory determinations. The rendering of such determinations is inimical to the method by which a court finds and applies ruling principles of law—that is, in the context of deciding "a concrete case" determining "the legal rights of the parties in an adversary proceeding upon the facts alleged. . . ." *Aetna Life Insurance Co. of Hartford, Conn.* v. *Haworth,* 300 U.S. 227, 241 (1937). See also Tribe, *American Constitutional Law,* 53-62 (1978). Such opinions are considered as "advance expressions of legal judgment upon issues which remain unfocused. . . ." *United States* v. *Freuhauf,* 365 U.S. 146, 157-158 (1961) (per Frankfurter, J.).

Where the factual context calling for application and interpretation of a statute has not been fixed, the determination of such questions "involves too remote and abstract an inquiry for the proper exercise of the judicial function." *International Longshoremen's & Warehousemen's Union, Local 37* v. *Boyd,* 347 U.S. 222, 224 (1954).

The impropriety of review on this record is even more plain than in *Freuhauf, supra.* That this is so is manifest in the questions framed by petitioners. (Petition, 2-3). The first and third are stated in purely abstract terms. The second is wholly hypothetical, as well as a disingenuous mischaracterization of a complaint no longer existing in the litigation, since it has been dismissed with leave to replead.

Particularly where the bounds of a controversy remain inchoate, as where no complaint has either been finally sustained or finally dismissed, and there is no factual record, let alone an adequate one, certiorari is inappropriate. Petitioners cite several cases for the proposition that this Court has reviewed the outcome of a "pre-answer motion to dismiss", i.e., *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723 (1975); *Santa Fe Industries, Inc.* v. *Green,* 430 U.S. 462 (1977); *Touche Ross & Co.* v. *Redington,* 99 S.Ct. 2479 (1979); *Transamerica Mortgage Advisors, Inc. (TAMA)* v. *Lewis,* 100 S.Ct. 242 (1979). (Petition, p. 9) But in each of those cases there had at least been a final determination by the Court of Appeals confirming the adequacy of the complaint so that a presumptive factual record was before this Court. See e.g., *Conley* v. *Gibson,* 355 U.S. 41 (1957).

Petitioners have not cited, and respondents have not found, any case where this Court has agreed to consider questions of federal law in the vacuum that arises where a Court of Appeals has found the complaint to be inadequate, and has remanded with leave to replead. In such a context, to resolve questions involving the interplay between § 10(b) and § 18 of the Exchange Act without knowing whether an amended pleading might in the future present such a question, is to consider a hypothetical issue in an abstract context, in violation of the well settled tenets promulgated by this Court for its exercise of certiorari jurisdiction.

2. *The Decision of the Court of Appeals Creates No Conflict With Any Decision of This Court, and It Decided No Significant Unsettled Question of Federal Law.*

In order to establish a conflict between the decision below and decisions of this Court or decisions of other Circuits, so as to justify review, there must be "a real conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles util-

ized." Stern & Gressman, *Supreme Court Practice,* 264 (5th Ed. 1978). See, *Layne and Bowler Corp.* v. *Western Well Works,* 261 U.S. 387, 392-393 (1923); *Keller* v. *Adams-Campbell Co.,* 264 U.S. 314 (1924); *Wisconsin Electric Co.* v. *Duxmore Co.,* 282 U.S. 813 (1929).

Petitioners erroneously contend that the Court of Appeals here created a new judicial remedy which is in conflict with the teachings of recent decisions of this Court; but petitioners read far too much into the very decisions they rely upon. In essence, they insist that the Court of Appeals should have pretended that it was writing on a clean slate, and should have commenced a *de novo* consideration whether Congress intended to create a private remedy under § 10(b).

The Court of Appeals created no new remedy. Rather, it reconfirmed the contours of the private claim for relief under § 10(b) held to be well-established by this Court; that is, a claim for relief against fraud, on behalf of purchasers or sellers of securities. *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, at 194-198 (1976); *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, at 732-734, 745 (1975).*

In so doing, the Court adhered to the approach of this Court in *Blue Chip Stamps, supra,* in dealing with well settled legal doctrine. As the Court there said:

---

* In fact, by the time this Court first dealt with the question, the existence of on implied right of action under § 10(b) was considered too well established to require discussion, in the light of the overwhelming existing consensus in the courts of appeals and district courts, *Superintendent of Insurance* v. *Bankers Life & Cas. Co.,* 404 U.S. 6, 13, n.9 (1971); *Affiliated Ute Citizens of Utah* v. *United States,* 406 U.S. 128 (1972). That these rights were available to buyers as well as sellers had also, by then, been settled. E.g., *Jordan Bldg. Corp.* v. *Doyle, O'Conner & Co., Inc.,* 401 F.2d 47 (7th Cir. 1968); *Fischman* v. *Raytheon Mfg. Co.,* 188 F.2d 783 (2d Cir., 1951); *Ellis* v. *Carter,* 291 F.2d 270 (9th Cir. 1961); *Doelle* v. *Ireco Chemicals,* 391 F.2d 6 (10th Cir. 1968); *Drake* v. *Thor Power Tool Co.,* 282 F. Supp. 94 (N.D. Ill. 1967).

> "We are dealing with a private cause of action which has been judicially found to exist, and which will have to be judicially delimited one way or another unless and until Congress addresses the question. Given the peculiar blend of legislative, administrative, and judicial history which now surrounds Rule 10b-5, we believe that practical factors to which we have adverted, and to which other courts have referred, are entitled to a good deal of weight.
>
> Thus we conclude that what may be called considerations of policy, which we are free to weigh in deciding this case, are by no means entirely on one side of the scale." (421 U.S. at 749-750)

The Court of Appeals was also correct that the proper scope of the § 10(b) remedy was not illuminated by *Transamerica Mortgage Advisors, Inc. (TAMA)* v. *Lewis,* 100 S.Ct. 242 (1979) or *Touche Ross & Co.* v. *Redington,* 99 S.Ct. 2479 (1979), which dealt with whether *new* implied remedies should be recognized under relatively obscure statutes; and neither its decision or reasoning was in conflict with those recent cases.

In *Touche Ross, supra,* the Court held, upon its first consideration of the question, that no private claim for relief legitimately arose by implication from § 17(a) of the Exchange Act, which "simply requires broker-dealers and others to keep such records and file such reports as the Commission may prescribe," and which, unlike the statutes under which an implied right had been sustained, neither "prohibited certain conduct" nor "created federal rights in favor of private parties" (At 2485). This was the dispositive holding of *Touche Ross.* The Court's comment that "[t]here is evidence to support the view that § 18(a) was intended to provide the exclusive remedy for misstatements contained in any reports filed with the Commission", lends no support to the petitioners' position since the

Court there was only dealing with the interplay between § 18 and § 17(a) of the Exchange Act and not with § 10(b).

Nor is there conflict with this Court's decision in *Transamerica Mortgage Advisors, Inc., supra,* where this Court recognized an equitable private right of action under § 215 of the Investment Advisers Act of 1940, and declined to imply a private claim for damages under § 206 of that Act. The Court pointed to the absence from the Advisers Act of any express private civil liability provisions, and the absence of an explicit grant of federal jurisdiction over actions at law as factors which called for a narrower reading of this statute than had been given to those under which private damage suits had been found proper. This has no bearing on interpretation of the Exchange Act.

There is *a fortiori* no conflict with *Cannon* v. *University of Chicago,* 441 U.S. 677 (1979), wherein this Court allowed a new implied private right of action under § 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681. The Court there concluded that all of the criteria set out in *Cort* v. *Ash,* 422 U.S. 66 (1975) for implication of a private right of action, even a new one, were present although there was evidence in the legislative history that express provision of such a remedy had been urged in debate, but not adopted. While there was an indication that the Court employed a stricter analysis in *Cannon* than it had in the earlier cases arising under the federal securities laws, the Court made clear that it continued to recognize the historical legitimacy of the latter.

Far from being novel, the decision of the Court of Appeals in this respect was wholly in harmony, not only with the expressions of this Court, but with the seminal court of appeals decision considering the question, *Fischman* v. *Raytheon Mfg. Co.,* 188 F.2d 783 (2d Cir. 1951). In essence, the *Fischman* court, and the Court of Appeals here, properly understood that the right and remedy provided by § 10(b) differ in kind, and not merely in degree,

from that provided by § 18, or § 11 of the Securities Act of 1933. The distinction is that § 10(b) offers relief only where the action is predicated upon fraud. Section 18, like § 11, has no requirement that plaintiff plead or prove any wrongful intention on the part of the defendant. It was because of this lack of a requirement of proof of wrongful intent that Congress surrounded the § 18 remedy, like the § 11 remedy, with procedural and substantive constraints.* The fear of unjustified imposition of liability, expressed in the portions of the legislative history referred to by petitioners, was expressed in debate as to the scope of a remedy for non-fraudulent conduct, or "mistake." (See, Petition, 17)

Section 10(b), as the Court of Appeals explained here and in *Fischman,* retains the contours of the common law action for fraud; and thus does not give rise to the prospect of unfairly imposing liability upon a defendant who promulgated misleading information without the intent to commit any wrong. Further, the close relationship, between § 17 and § 18 of the 1934 Act is not duplicated in § 18's relation to § 10(b). As the Court of Appeals properly observed, it was clearly the expectation of Congress that the establishment of the SEC, and the requirement that corporate reports be filed with it, would in and of itself, not only encourage the filing of truthful reports, but would encourage investors to rely specifically upon those filed reports. (A-23) Accordingly, there was ample reason to provide a special, non-fraud, remedy for false and misleading filings.

There simply is no such schematic interplay between § 18 and § 10(b). Whereas § 18 focuses narrowly on the

---

* Congress was wholly aware of the significance of this allocation of the burden of proof. A vigorous effort was made on the House floor to amend Section 18 to require a plaintiff to prove wrongful intent, and thus to convert it into a fraud-type statute. See 78 Cong. Rec. pp. 8038-8040. The charge was made that without the amendment, the defendant became an insurer. The amendment was rejected, *Ibid.*

isolated act of filing a misleading document with the SEC, only § 10(b) broadly prohibits "any manipulative or deceptive device or contrivance", including, as set out in Rule 10b-5(c) "any . . . practice or course of conduct which operates . . . as a fraud. . . ." Section 10(b) is thus the only section of the Exchange Act which deals with a fraudulent ongoing course of conduct. Since nothing in the decision of the Court of Appeals changed any existing law, created or altered any existing remedy, or determined any actual controversy, there is no occasion for this Court to consider, in this context, the relationship, if any, between § 10(b) and § 18.

Further, the Court of Appeals was correct in considering the consequences that would eventuate were it to disturb the scope of an existing, long recognized, private claim for relief. It correctly described the consequences of accepting petitioners' contentions, that is, that it would eliminate from the law the protection for open market investors which has become "the primary mechanism[s] by which" they could obtain "redress against those who manipulate the market by fraudulent activity." (A-24).

In *Blue Chip Stamps* this Court aptly described the reality that required such a conclusion:

> "In today's universe of transactions governed by the 1934 Act, privity of dealing or even personal contact between potential defendant and potential plaintiff is the exception and not the rule. The stock of issuers is listed on financial exchanges utilized by tens of millions of investors, and corporate representations reach a potential audience encompassing not only the diligent few who peruse filed corporate reports or the sizeable number of subscribers to financial journals, but the readership of the Nation's daily newspapers. Obviously neither the fact that issuers or other potential defendants under Rule 10b-5 reach a large number of potential investors, or the fact that they are required by law to make their disclosures conform to certain standards, should in any way absolve them from liability for misconduct which is proscribed by Rule 10b-5." (421 U.S. at 745)

As the decision in the Court of Appeals creates no conflict with the decisions of this Court, and decided no significant unsettled questions of federal law, there is no reason to review it.

3. *There Is No Conflict With the Decisions of Other Circuits in the Decision Below; Nor Does It Raise Any Unsettled Question as to the Law of Causation or Reliance.*

Petitioners, seeking to posit a conflict among decisions of the circuits, where none exists, accuse the Court of Appeals here of "dispensing with" the reliance requirement of § 10(b). This is a false issue. Neither the Court of Appeals nor the District Court had any occasion to actually pass upon the question whether, or to what extent, reliance or causation-in-fact, or both, were affirmative elements of respondents' case.

Emboldened by the lack of either a subsisting pleading or a factual record, petitioners misstate the position taken by respondents when they claim that respondents "admitted they 'did not read or see, much less actually rely upon' the statements of which they complained. . . ." (Petition, 25). What respondents in fact said, as revealed earlier in the Petition itself (at p. 6) was that they did not read, see or actually rely upon "filed" documents. Respondents did, in fact, assert reliance and causation in fact. They said that they, "and others similarly situated," purchased their Robins shares "in reliance upon the aforementioned misleading public reports and press releases and upon the integrity of the market. . . ." (Complaint, ¶ 47; F-19).

Had this complaint survived, there would be no question but that plaintiffs would seek to prove, as to themselves, reliance upon the total mix of information made available, in the absence of disclosure of material adverse information. The cited statement in their brief to the Court of Appeals merely emphasized that they did not personally claim direct reliance on either of the two Forms 10-K referred to in their pleading. As this Court recognized in *Blue Chip Stamps, supra,* at 745, this is typical of the large class of investors who receive their information indirectly, through public media, with respect to securities they consider purchasing, and not through actual examination of "filed corporate reports". Respondents, in short, never suggested or argued that they could recover without a showing that their reliance on the integrity of the market in fact caused their purchases and that their loss was caused by defendants' conduct. Such causation in fact is, of course, the settled law of the Second Circuit. See *Schlick* v. *Penn-Dixie Cement Co.,* 507 F.2d 374 (2d Cir. 1974). This Court, in *Blue Chip Stamps, supra,* made plain its view that such indirect transmission of information to the general run of investors should not "absolve . . . from liability" under Rule 10b-5, those who disseminate misinformation, or who fail to disclose material information to the public. 421 U.S. at 745.

Thus, even if this Court had before it for review, a concrete case of the character actually sought to be litigated by respondents here (which it does not), it is clear that the issue proposed by petitioners simply would not exist. There is no reason for considering the hypothetical question.

The comment by the Court of Appeals, in explaining the importance of certain differences between the direct reliance requirement apparently established by § 18 and the comparatively attentuated reliance—causation in fact

requirements imposed under varying circumstances under § 10(b), was neither a holding, nor, *a fortiori,* a decision which created a conflict with any other appellate decision. (A-15) It did not rest its opinion that the two sections are not mutually exclusive, under the circumstances presented, upon that distinction. Rather, the crucial distinction which the Court of Appeals saw was the difference first recognized in *Fischman, supra,* which pointed out that, to establish a § 10(b) violation, a plaintiff must plead and prove *scienter,* and thus, in effect, fraud; while, under § 18, the plaintiff must merely "plead and prove" a material misstatement or omission in a document filed with the Commission, leaving it to the defendant to raise and prove the defense of good faith and the absence of knowledge. (A-22)

The Court's expression of the distinction between the § 18 and § 10(b) standards regarding these elements is not in conflict with any other appellate decision. The Court of Appeals here was clearly referring to an open market situation where this misinformation, or omission, had affected the total mix of information available to investors. The four cases relied on by petitioners are not to the contrary.

In *Landy* v. *FDIC,* 486 F.2d 139 (3d Cir. 1973), *cert. denied,* 416 U.S. 960 (1974), the Court dismissed for lack of a showing of reliance only with respect to reports of a defendant accountant that had not been prepared for or disseminated to the public or the subject company's stockholders. Under these circumstances it said that "the presumption of reliance sometimes used in other circumstances when a statement is material is inapplicable here. . . ." and noted that such a presumption might indeed apply to annual reports issued by the subject corporation. (486 F.2d at 170)

Dupuy v. *Dupuy,* 551 F.2d 1005 (5th Cir. 1977), *cert. denied,* 434 U.S. 911 (1977), and *Holdsworth* v. *Strong,* 545

F.2d 687 (10th Cir. 1976), *cert. denied,* 430 U.S. 955 (1977), are even further from the point. ~~In each~~, the plaintiff had asserted as the principal basis for relief, affirmative misrepresentations made in *face to face* transactions, involving the sale by plaintiffs to defendants of the stock in *close corporations.* Where the allegedly defrauded seller is himself an insider, and thus in at least a good position as defendants to obtain accurate information directly, there is no parallel to the situation of the ordinary investor in the public corporation, who generally relies upon information received at second hand, from public media of communication. In the close corporation—insider sale context, it is clear that the Second Circuit is in accord with these decisions. See, e.g., *Schlick* v. *Penn-Dixie Cement Corp., supra,* cf. *Jackson* v. *Oppenheim,* 533 F.2d 826 (2d Cir. 1976).

Finally, there is no conflict between the decision below and *Vervaecke* v. *Chiles, Heider & Co., Inc.,* 578 F.2d 713 (8th Cir. 1978). There, the Court emphasized that plaintiff had actually asserted that he was personally misled by, and caused to buy the securities at issue by, the contents of an offering prospectus. Later, in his deposition, he admitted that, while the offering statement had been mailed to him, he could not recall that he had read it before he purchased the securities. Further, he could not recall whether he read the offering statement sent to him by the broker whom he had chosen to sue. Thus, the Eighth Circuit affirmed the grant of summary judgment below, on the grounds that there was no proof that there was any causal connection between plaintiff's receipt of an offering statement from defendant and his loss. (578 F.2d at 718-719). The Court, at the same time, made plain that, under more appropriate circumstances, it would follow the "less stringent test of causation" in non-disclosure cases, in accord with the doctrine of *Affiliated Ute Citizens* v. *United States, supra.*

Thus, the Court of Appeals' illustrative comments upon the state of the law of reliance in open market cases raises no conflict of authority; nor does it create an unsettled question of importance in the federal law of securities.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

ERIC L. KEISMAN
Attorney for Respondents
845 Third Avenue
New York, New York 10022
(212) 759-4600

Of Counsel:

MARIAN R. PROBST
WOLF POPPER ROSS WOLF & JONES